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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 26, 1969.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–17a) is reported at 410 F. 2d 1052. The orders of the district court (Pet. App. 18a–21a) are unreported.[1]

[1] "Pet. App." refers to the appendix to this petition. "App." refers to the Appendix filed in the court of appeals.

JURISDICTION

The order of the court of appeals was entered on March 26, 1969. On June 16, 1969, Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to August 23, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in implementing the Wool Products Labeling Act of 1939, the Federal Trade Commission was authorized to adopt Rule 36 thereunder, which provides for the detention of uncertified imported wool products at the border—or their release under bond—until the products have been tested to determine whether they are mislabeled in violation of the Act.

STATUTES AND REGULATIONS INVOLVED

Rule 36, 16 C.F.R. 300.36, is set forth at Pet. App. 13a–17a.

Section 6(a) of the Wool Products Labeling Act of 1939, 15 U.S.C. 68d(a), provides as follows:

> (a) Except as otherwise specifically provided herein, sections 68–68j of this title shall be enforced by the Federal Trade Commission under rules, regulations and procedure provided for in the Federal Trade Commission Act.
>
> The Commission is authorized and directed to prevent any person from violating the provisions of sections 68–68j of this title in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated

into and made a part of sections 68–68j of this title; and any such person violating the provisions of said sections shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of sections 68–68j of this title.

The Commission is authorized and directed to make rules and regulations for the manner and form of disclosing information required by sections 68–68j of this title, and for segregation of such information for different portions of a wool product as may be necessary to avoid deception or confusion, and to make such further rules and regulations under and in pursuance of the terms of said sections as may be necessary and proper for administration and enforcement.

The Commission is also authorized to cause inspections, analyses, tests, and examinations to be made of any wool products subject to sections 68–68j of this title; and to cooperate with any department or agency of the Government, with any State, Territory, or possession, or with the District of Columbia; or with any department, agency, or political subdivision thereof; or with any person.

STATEMENT

Section 3 of the Wool Products Labeling Act of 1939 [hereafter "Wool Act"] declares generally that the sale or distribution of mislabeled wool products

is unlawful and is an unfair method of competition and an unfair and deceptive practice under the Federal Trade Commission Act. 15 U.S.C. 68a. Section 8 of the Wool Act provides that all wool products imported into the United States "shall be stamped, tagged, labeled, or otherwise identified" in accordance with the Act. 15 U.S.C. 68f. In enforcing the Act with respect to wool products produced in the United States, the Commission utilizes the familiar cease-and-desist procedure established by Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Under this procedure, the distributor of a misbranded product does not come under constraint until there has been an administrative hearing which results in a cease-and-desist order subject to judicial review.[2]

The Commission has adopted a different procedure with respect to imports. Rule 36 provides that imported wool products shall be retained in Customs custody unless the Commission has issued a notice of release or the importer has furnished a bond, and the Commission may refuse to issue a notice of release if its tests indicate that the product is mislabeled. The court of appeals held that the Commission's general rule-making authority under the Act could not be read to

[2] Alternatively, the Commission may bring a suit for condemnation of the wool products, or for a preliminary injunction pending the outcome of the administrative cease-and-desist proceedings. 15 U.S.C. 68e. In either event, the distributor of the mislabeled domestic wool product is entitled to a hearing before being subjected to constraint.

authorize a procedure "alien to the normal Commission cease and desist practice" (Pet. App. 6a–7a).

1. RULE 36

Rule 36 (Pet. App. 13a–17a) applies to any person who imports wool products subject to a requirement of formal entry through Customs. The importer must file with the Bureau of Customs a form setting forth certain information, including the fiber content of the goods. The Bureau of Customs forwards this information to the Federal Trade Commission. Rule 36(a). The importer may obtain immediate release of the goods by filing a bond in a form acceptable to the Commissioner of Customs, conditioned upon redelivery to Customs custody if the Commission determines not to issue the notice of release. Rule 36(b). Failure to redeliver subjects the importer to liquidated damages under the standard Bureau of Customs bond, utilized under the Rule. Rule 36(b), (f). If the importer does not furnish a bond, he can obtain release of the goods from Customs custody only if the Commission issues a notice of release.

A notice of release may be obtained prior to entry of the goods. This "preentry notice of release" may be obtained by submitting a request "accompanied by such information or data, including manufacturers' records, laboratory analyses, foreign government certifications, and certifications of government designated trade associations or other bodies, as will show no reason to believe that [the imported products] may be misbranded." Rule 36(d). The request may also show whether the products are of the same type and

from the same manufacturer as products previously released. *Ibid.* The request must be filed at least seven working days before the entry. If this is done, the Commission must act before the entry is made, either issuing a notice of release, informing the importer that the goods will have to be tested, or requesting more information. *Ibid.*

If a preentry notice of release is not obtained, application for the notice of release is made when the goods arrive at the port of entry. Rule 36(c). If a Commission inspector is on duty at that port, he must act within three days; if no inspector is on duty at the port, the Commission must act within three days of receiving the request for release. *Ibid.* Failure by the Commission to act within the required time is equivalent to issuance of the notice of release. *Ibid.*

Upon application for a notice of release, the Commission may determine that testing is required. Rule 36(e). The Commission will immediately issue a notice of release if the test results show the product to be correctly labeled or, if the tests reveal that the goods are misbranded, as soon as they have been correctly relabeled. *Ibid.*

2. REASONS FOR ADOPTION OF RULE 36

In its opinion of December 22, 1967, accompanying the issuance of the Rule (App. 32–38), the Commission explained that the Rule was "intended to achieve substantial equality in enforcement as between domestically produced products and imported products and designed to offer substantially equal protection to the public with reference to all types of wool prod-

ucts" (App. 33). The Commission noted that domestic manufacturers are required by the Act and regulations "to keep extensive and detailed manufacturing records disclosing the fiber content of products manufactured by them * * *. In many instances such records are records which would not ordinarily be kept in the regular course of business and are maintained at substantial expense * * *" (App. 33).[3] See 15 U.S.C. 68d (b), 16 C.F.R. 300.31. "Domestic manufacturers and dealers are also subject to inspections at their places of business by investigators of the Commission's Bureau of Textiles and Furs" (App. 33). Prior to promulgating the Rule, the Commission had said in *In the Matter of R. H. Macy & Co., Inc.*, FTC Docket No. 8650, decided November 29, 1967 (App. 95, 97),[4] that the records which domestic manufacturers keep enable the Commission to prevent many violations of the Act with respect to domestic products before they occur:

[3] In a separate statement made in response to Commissioner Elman's dissent from the promulgation of Rule 36, Chairman Dixon stated (App. 85):

"* * * In substance, domestic manufacturers have been required to maintain records which establish a line of continuity from the raw materials utilized in the manufacture of the product to the finished product, showing the supplier of the raw material, the fabric content of the raw material, and detailed manufacturing and blend records."

A statement of the purpose of the record-keeping requirement imposed on domestic manufacturers is also contained in the record-keeping regulation. 16 C.F.R. 300.31(b).

[4] The *R. H. Macy* case was a proceeding against a domestic retailer of allegedly mislabeled imported sweaters. In an opinion issued shortly after the then proposed Rule 36 was published the Commission explained some of its problems in enforcing the Wood Products Labeling Act against imports. See App. 95–99.

> Through such records, it is possible to establish a line of continuity from the finished product back to the origin of the raw fibers. This record keeping plus periodic inspections by Commission personnel provides an effective means of policing the labeling of domestically produced wool products to prevent incipient violations of the statute.

By contrast, the Commission pointed out, "[f]oreign manufacturers and producers are not subject to the [record-keeping and inspection] requirements and are not subject to the jurisdiction of the Federal Trade Commission. Therefore, the Commission has found it necessary to develop a different program intended to achieve substantial equality in enforcement as between domestically produced products and imported products and designed to offer substantially equal protection to the public with reference to all types of wool products" (App. 33).

3. ENFORCEMENT OF RULE 36

The Commission's opinion accompanying the issuance of Rule 36 states (App. 36):

> Every effort has been made to minimize delays. At those points of entry where a sufficiently large number of wool imports arrive, the Commission will place inspectors on duty so that they may determine upon arrival whether to release a shipment or require its testing or certification. * * *

Furthermore, the Commission stated that the testing procedure is "not intended to be applicable to

products which are not indicated to be subject to wide-spread misbranding" (App. 34). Finally, even in those cases where the goods are required to be tested, the Commission stated it would permit the goods to pass through Customs under bond as provided for in the Rule—which is the form of bond presently furnished by importers under standard importation procedures (App. 35).

Because of the preliminary injunction entered in this case (Pet. App. 19a–21a), there have been only five days of actual enforcement experience under Rule 36 (February 12–16, 1968). During that time, the Commission's Bureau of Textiles and Furs had two men stationed at the Customs House in downtown Manhattan and two men at the Kennedy International Airport (App. 107). They processed approximately 700 shipments during those five days.[5] In general, the processing consisted of ascertaining that the required papers were properly and completely filled out, and determining whether to issue a notice of release or require testing. Most entries were fully processed in a few minutes, and none required longer than 30 minutes. (App. 107–108.) The actual testing of the products, when required, can be performed in a few hours (App. 111).[6]

[5] Approximately 60 percent of imported wool products come through the Port of New York (App. 104). During the five-day period when Rule 36 was in effect, approximately 700 shipments came in through New York, while only 150 came in through other ports (App. 103–104).

[6] The Affidavit of Idelle M. Shapiro, a textile technologist in charge of the Bureau of Textiles and Furs' testing laboratory

4. PROCEEDINGS IN THIS CASE

Respondents, who are importers of wool products and an association representing such importers, brought the present suit in the United States District Court for the District of Columbia seeking to have Rule 36 declared invalid and its enforcement enjoined. Judge Hart granted a preliminary injunction against enforcement of the Rule (Pet. App. 19a–21a), but in subsequent proceedings in the case Judge Corcoran granted the Commission's motion for summary judgment and a motion of the intervenors (associations of domestic wool products producers) to dismiss the suit for lack of jurisdiction (Pet. App. 18a).

On appeal, the court below reversed and remanded the case with directions to grant summary judgment for the respondents and a permanent injunction against the enforcement of Rule 36. The court of appeals held, first, that the case is ripe for determination

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in Washington, gave details of the testing procedure (App. 114–115):

"The testing of wool products for fiber content involves long recognized scientific techniques. * * * A quantitative analysis of a wool product containing more than one fiber can be accurately performed by these methods in a relatively short period of time. A quantitative microscopic analysis can be usually completed in three hours or less. A quantitative chemical analysis usually requires approximately four hours for a two fiber analysis, with an additional three or four hours being required for each additional fiber type to be analyzed. The reason for the longer times is that samples must be dryed in an oven after each procedure. The actual time a technician spends working on a sample is minimal and numerous samples can be tested at the same time. An analysis of a product containing only one fiber or a qualitative analysis of several fibers can be made in a matter of minutes."

under the criteria of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (Pet. App. 3a–6a)—a holding which is not challenged in this petition. The court further held that Rule 36 is not authorized by the Wool Act's general provision authorizing the Commission to promulgate rules "necessary and proper for administration and enforcement" of the Act, in light of (1) the lack of any supportive legislative history, (2) the fact that an earlier version of the bill had contained an explicit provision applicable to importers which was substantially similar to Rule 36 and which was omitted from the version later enacted, and (3) references in the floor debates on the bill indicating, in the court's view, that it was intended that the Act would be enforced against importers by the Bureau of Customs rather than the Federal Trade Commission (Pet. App. 6a–10a). Finally, the court held that the Rule could not be justified on the basis of legislative authorization of the Commission to cooperate with other agencies of government in enforcing the Act, coupled with the authority of the Bureau of Customs under the Tariff Act of 1930 to detain goods at the port of entry, because, *inter alia,* the Commission did not claim to be relying on this authority in promulgating the Rule and, in any event, authority committed to one agency of the government cannot be exercised by another (Pet. App. 10a–12a).

REASONS FOR GRANTING THE WRIT

This case presents an important question of the Commission's authority to devise new enforcement techniques designed to protect the public against mis-

labeled imported wool products.[7] To a large extent, the Commission is able to keep misbranded domestic wool products off the market, since it has the authority to inspect domestic manufacturers' records and require that these records disclose fiber content. See 15 U.S.C. 68d(b), 16 C.F.R. 300.31. Lacking such authority in the case of foreign manufacturers, the Commission seeks in Rule 36 to subject imported wool products to inspection at the port of entry—a procedure which is entirely in accordance with usual Customs practice. Without such a procedure, the Commission has no effective means to keep mislabeled imported wool products off the market. See *supra,* n. 7. The decision below thus significantly restricts the Commission's ability to enforce the Wool Act with respect to imported wool products.

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[7] The inadequacy of cease-and-desist proceedings with respect to imports had been explained by Chairman Dixon to a House Appropriations Subcommittee:

"Now in recent years, big buyers and big sellers, big department stores import large quantities of woolen knit sweaters. Primarily the problem came in the form of a sweater that could come in labeled 'all wool' or 'virgin wool' or 'cashmere' if they wished to do it, and apparently they were coming from certain sections of the world.

"Their competitors would buy them, have them tested and complain to the Federal Trade Commission. We tried to resolve it by a proceeding. That wasn't a good enough answer because it was after the fact and literally hundreds of thousands of these items might get into commerce and be sold before you could do anything about it."

Hearings before a Subcommittee of the House Committee on Appropriations, on Independent Offices and Department of Housing and Urban Development Appropriations, 1968, 90th Cong., 1st Sess., at 944 (App. Vol. II, Document G, Exh. 2).

An appropriation for enforcement of Rule 36 was enacted on October 4, 1968. Public Law 90–550, 82 Stat. 937.

1. Section 6(a) of the Wool Act (*supra*, pp. 2–3) authorizes the Commission to make rules and regulations concerning the manner in which wool products must be labeled, and to make "such further rules and regulations under and in pursuance of the terms of [the Act] as may be necessary and proper for administration and enforcement." 15 U.S.C. 68d(a). Section 6(a) also authorizes the Commission "to cause inspections, analyses, tests, and examinations to be made of any wool products subject to [the Act]" and "to cooperate with any department or agency of the Government * * *." 15 U.S.C. 68d(a). These provisions take on special importance in light of the fact that under the Tariff Act of 1930, Section 499, as amended, 19 U.S.C. 1499, the Bureau of Customs is authorized to hold imported merchandise in Customs custody until either it is found to comply with the laws the Bureau of Customs is authorized to enforce, or a bond conditioned on compliance is furnished.

The legislative history of the Wool Act establishes that it is a law which the Bureau of Customs, as well as the Commission, is authorized to enforce;[8] indeed,

[8] The intention that the Bureau of Customs would conduct tests of imported wool products, and utilize existing Customs procedure to exclude misbranded products and to enforce the labeling requirements of the Wool Act, was made explicit by Senator Schwartz, the sponsor of the legislation, during the Senate debates preceding passage of the Act (84 Cong. Rec. 9496 (July 19, 1939)):

"It was and is also complained that it will be impossible to secure protection from imports from foreign countries. By tying in labeling with the customs laws and with cooperation from the Treasury Department the difficulties surmised will be overcome under the terms of Senate bill 162 and House bill

shortly after passage of the Act, the Bureau adopted a regulation authorizing detention of imported wool products at the border, or their release under bond, pending inspection and testing.[9] Thus, the Bureau of Customs has clear statutory authority to test imports for compliance with the Wool Act prior to releasing them from Customs custody. The effect of Rule 36 is merely to make the Federal Trade Commission a participant in this Customs procedure, by conditioning

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944. The Secretary of the Treasury, in his letter to the House committee, specifies the number and official character of employees needed at our ports and abroad to perform the duties required."

Senator Schwartz then went on to read a letter from the Secretary of the Treasury stating that adoption of the bill would require the Department to hire "four examiners of merchandise and four clerks * * * in the offices of the respective appraisers of merchandise. It is also estimated that three junior analysts and five assistant analysts will be required in the respective laboratories * * *." *Ibid.* Clearly, the understanding was that the Department of the Treasury required these additional employees only because the Bureau of Customs was required to enforce the Act, through examination and testing of imported wool products.

[9] The regulation provided:

"(c) Packages of wool products subject to the provisions of this article which are not designated for examination may be released pending examination of the designated packages, but only if there shall have been filed in connection with the entry the usual customs single entry bond * * *."

See 6 Fed. Reg. 2480 (May 20, 1941). (The Wool Products Labeling Act was enacted on October 14, 1940, to be effective nine months after the date of passage, 54 Stat. 1128, 1133.) Further provisions of the regulation stated that if tests show mislabeling, immediate return of the goods released under the bond could be demanded or liquidated damages in the amount of the value of the goods collected, unless the lack of compliance was corrected. *Ibid.* This regulation is presently in effect. See 19 C.F.R. 11.12.

release from Customs custody upon issuance of a notice of release by the Commission, after testing by the Commission or by Commission-approved private laboratories.

The Commission's experience and resources are thereby made available to assure that imported, as well as domestic, wool products are distributed in compliance with the Act, and unnecessary duplication of functions by two government agencies is thus avoided. The Commission's explicit authority to establish rules and regulations for enforcement of the Act, in combination with its authority to cooperate with other agencies of government and to test and examine wool products, is a sufficient statutory basis for the Rule—which merely establishes a cooperative procedure to implement the Wool Act by means of the enforcement process authorized by the Tariff Act of 1930.

2. From the beginning,[10] Rule 36 was intended to utilize existing Customs procedures; indeed, it is apparent from the face of the Rule that it could not be

[10] Shortly before the promulgation of the Rule, Chairman Dixon of the Commission referred briefly in testimony before an appropriations subcommittee to coordination between the Commission and the Bureau of Customs in formulating the Rule. Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices Appropriations for 1967, 89th Cong., 2d Sess., p. 415; Hearings before a Subcommittee of the House Committee on Appropriations on Independent Offices, etc., Appropriations, 1968, 90th Cong., 1st Sess., pp. 944–948 (reprinted in App., vol. II, Doc. G, Exhs. 1 and 2).

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enforced without exercise by the Bureau of Customs of its authority to stop goods at the border. Thus the Rule applies only to imported wool products "subject to a requirement for formal entry through Customs." Subsection (a) (Pet. App. 13a). The entry form prescribed by the Rule must be filed with the Bureau of Customs, and the Bureau must forward the form to the Commission. *Ibid.* The Bureau must then retain custody until it receives the Commission's notice of release, unless the importer furnishes a bond "in a form acceptable to the Commissioner of Customs conditioned upon the redelivery to Customs custody of the goods or any part thereof, upon demand by an officer of the Bureau of Customs" when the Commission does not issue a release. Subsection (b) (Pet. App. 13a–14a).

These provisions show that the Commission is not seeking to usurp authority belonging to the Bureau of Customs; instead, the Commission is simply aiding the Bureau in exercising its authority under the Tariff Act of 1930 to detain goods at the border for inspection to determine compliance with the requirements of the Wool Act. It is true, as the court of appeals noted, that all important determinations under the Rule are to be made by the Commission (Pet. App. 11a). But these determinations can be enforced only through exercise of the authority of the Bureau of Customs to stop goods at the border; if the Bureau chose to disregard Rule 36, the Commission would be powerless to prevent the entry of misbranded products. The court of appeals erred, therefore, in holding that the Rule violates the principle that the authority com-

mitted to one agency may not be exercised by another.[11]

The court of appeals similarly erred in viewing Rule 36 as violating the congressional intention that the Bureau of Customs enforce the exclusion of mislabeled wool products through established Customs procedures. Under Rule 36, the exclusion of mislabeled products is enforced by the Bureau of Customs, since it is the Bureau which detains those goods as to which the Commission refuses to issue a notice of release, and which enforces the importer's bond. The fact that under Rule 36 the actual testing is performed by the Commission (the agency primarily responsible for, and whose personnel are experienced in, the substantive enforcement of the Wool Act), rather than by Customs, is consistent with the congressional intent—especially in view of the Commission's explicit authority under Section 6(a) to perform tests and to cooperate with the Bureau of Customs.

[11] For the same reasons, we disagree with the court's characterization of the Commission's reliance on the authority of the Bureau of Customs under 19 U.S.C. 1499 as a "post-promulgation rationalization." (Pet. App. 12a). Rule 36 was issued under the authority of Section 6 of the Wool Products Labeling Act; in its opinion accompanying issuance of the Rule, the Commission quoted those portions of Section 6(a) giving it authority to issue rules and regulations necessary for enforcement of the Act, to cause inspections and tests to be made of wool products subject to the Act, and to cooperate with any other agency of government (App. 37). As discussed *supra*, the Rule itself provides for enforcement of the Act through cooperation between the Commission and the Bureau of Customs: the Commission tests goods which are detained by Cutoms, advises Customs of its determination based on the tests, and relies on Customs to enforce such determination by denying entry, or by enforcing the importer's bond.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1969.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 22505

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, ET AL., APPELLANTS

v.

FEDERAL TRADE COMMISSION, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided March 26, 1969

Before BURGER, WRIGHT and MCGOWAN, Circuit Judges.

2a *ff.*

WRIGHT, *Circuit Judge:* In the Wool Act of 1939 [1] Congress provided that all wool goods introduced into commerce must bear a label identifying the wool content of the material. General supervision of the Act was vested in the Federal Trade Commission. On December 22, 1967, the Commission promulgated Rule 36 [2] which set out a detailed procedure whereby imported wool would be intercepted at Customs and tested by the Commission before it could be released into the country.

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[1] Wool Products Labeling Act of 1939, 15 U.S.C. §§ 68 *et seq.* (1964).

[2] 16 C.F.R. § 300.36 (1968. *See* Appendix for the full text of Rule 36.

Appellants, an association representing a large number of wool importers and a number of other importers not in the association, initially sought to dissuade the Commission from issuing Rule 36. Failing in that endeavor, they brought this suit in the District Court here, prior to the effective date of the rule, for a declaratory judgment and an injunction, claiming that Rule 36 was not authorized by the Wool Act, and that, if it was, it violated the Administrative Procedure Act [3] and the due process clause. Associations representing domestic wool growers and manufacturers intervened in favor of Rule 36. One District Court judge granted a preliminary injunction against enforcement of the rule; later, however, another District judge set aside the injunction and granted both the Commission's motion for summary judgment and the intervenors' motion to dismiss for lack of jurisdiction because no justiciable case or controversy presently existed. Appellants appeal from these judgments.[4]

We hold that the case is ripe for determination now, and that Rule 36 is not authorized by the Wool Act. Accordingly, the judgment of the District Court is reversed and the case is remanded to that court with orders to grant summary judgment for appellants and a permanent injunction against enforcement of Rule 36.[5]

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[3] 5 U.S.C. § 551 (Supp.. III 1965–1967).

[4] Appellants asked for an injunction pending appeal, but the need for such was eliminated when the Commission stated it would hold Rule 36 in abeyance pending the decision of this court.

[5] In view of our disposition, we do not reach the issue whether, if the statute authorized such a rule, the rule nonetheless violates the Constitution or the Administrative Procedure Act. Further, we do not reach the question, perhaps necessary to a determination of constitutional or APA violation, whether im-

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The criteria for determining whether judicial review of Rule 36 is appropriate before the rule is specifically applied to any particular wool importer are set out in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967). Since an examination of that case reveals a situation generally similar to that presented by Rule 36, here, as there, judicial review at a pre-enforcement stage is appropriate.

Abbott involved a rule promulgated by the Commissioner of Food and Drugs. Prior to its enforcement, an association representing most drug manufacturers brought a suit for declaratory judgment and injunction, claiming that the rule was in excess of the authority given by the governing statute. The Supreme Court first looked to the statute to see if anything therein particularly *prohibited* a pre-enforcement injunction, pointing out the strong general presumption that orders of an agency adversely affecting persons are reviewable. The Court found no such prohibition in the statute.

The Court then went on to list the factors from which it concluded that the case was "ripe" for review at that time:

> "* * * [T]he issue tendered is a purely legal one * * *. * * *
>
> * * * * *
>
> "* * * The regulation challenged here, promulgated in a formal manner after announcement in the Federal Register and consideration of comments by interested parties is quite clear-

porters would be able to have a Rule 36 determination reviewed in either the Customs Court or the District Court. Finally, our disposition leaves open the question, as discussed in Part III, of the authority of the Bureau of Customs to promulgate and enforce a rule along the lines of Rule 36.

> ly definitive. There is no hint that this regulation is informal * * * or tentative. It was made effective upon publication, and the Assistant General Counsel for Food and Drugs stated * * * that compliance was expected.
>
> * * * * *
>
> "* * * [T]he impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. These regulations purport to give an authoritative interpretation of a statutory provision that has a direct effect on the day-to-day business of all prescription drug companies * * * * * *"

387 U.S. at 149–152. (Footnote omitted.)

Turning to Rule 36, we find that this rule will have an immediate and substantial impact on the day-to-day business of the wool importers. The rule provides that all wool imports will be temporarily detained as Customs while the Commission decides whether to issue a notice of release. The Commission has three days to make up its mind; if within the three days the Commission decides that it has reason to believe some goods may be mislabeled, it can order the goods further detained while it conducts tests. The tests may take a week or two or more. After the tests, the Commission can issue a notice of relase or refuse to do so until the importer changes the label. If the importer wishes to have the goods released prior to the Commission's determination, he can do so only upon posting a bond in the amount of the goods and risking forfeiture up to the value of any goods sold if the Commission ultimately decides that the goods are mislabeled. There is no provision for a hearing at any time, before either the Commission or the Bureau of Customs, and no provision for judicial review.

The record contains uncontradicted affidavits from wool importers that delivery of style woolen goods, such as sweaters, is a highly volatile business; styles change rapidly, and demand for goods must be met immediately. The importers make out a convincing case that the potential delays of several weeks even for goods found after testing to be correctly labeled, and the unlimited delay for goods found by the Commission to be mislabeled, could wreak havoc with their delivery schedules. The result might be that large stores, wary of the possibility that the imported goods may not be delivered on time, would shift to domestic orders. Further, for any shipment of goods actually detained, the stores would very probably end up cancelling the contract (the contracts usually contain a definite delivery time), forcing the importer to dump the goods into thrift stores at a considerable loss to the importers. In sum, a sufficient showing is made of substantial intereference by Rule 36 with the normal business of the importers.

Further, as in *Abbott,* the issue tendered is a purely legal one—whether the rule is in excess of statutory or constitutional authority. And here there is a serious question whether, and to what extent, the Commission's determination under Rule 36 would ever be reviewable since the rule contains no provision for review. In any case, review at a later time would only present the same issue, with no real clarification of any relevant fact.

As in *Abbott,* the rule here was "promulgated in a formal manner"; there is "no hint that this regulation is informal * * * or tentative." Another similarity with *Abbott* is that appellants here represent virtually the entire body of persons to be affected by the rule. Since their challenge goes to the basis of the rule itself and would, if successful, require permanently

enjoining the rule, it is to the advantage of both the importers and the Commission to know now whether the importers will have to live with the rule (and thus alter their contracts accordingly) or whether the Commission should cancel plans to appropriate sums and personnel to implement the rule before a large apparatus is actually set up.

Finally, here, as in *Abbott,* there is nothing in the controlling statute (the Wool Act) which indicates that such a rule cannot be reviewed until it is applied. For these reasons, then, the time is ripe for review and thus we turn to the merits.

II

The central issue is whether the Wool Act of 1939 allows the Commission to promulgate Rule 36. The Act of 1939 contains a general enforcement section, Section 6,[6] which states that the Commission shall enforce the Act through the traditional enforcement methods given it in the Federal Trade Commission Act.[7] Such enforcement is through the familiar cease and desist process: when wool goods are sold in commerce, the Commission can check to see if any are mislabeled; if it believes some are, it issues a notice to the manufacturer, holds a hearing, and then reaches a decision. Only after this hearing can a cease and desist order be issued, limited to goods still held out for sale in commerce. The Wool Act also contains a provision allowing the Commission to obtain a preliminary injunction when it feels the Act is about to be violated.[8]

Rule 36 provides for an entirely different enforcement process, one alien to the normal Commission

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[6] 15 U.S.C. § 68d.

[7] 15 U.S.C. §§ 41 *et seq.* (1964).

[8] Section 7, 15 U.S.C. § 68e.

cease and desist practice. The goods are held at Customs while the Commission, *ex parte*, decides whether to conduct tests. If tests are conducted, the Commission is the sole judge as to the results. The importer is given no hearing at any stage. In essence, this Rule 36 procedure resembles an *ex parte* licensing scheme. Nowhere does the Act explicitly authorize such a procedure. In view of this significant departure from ordinary agency practice, we look for some fairly strong indication, backed by sound policy, that Congress meant for the Commission to act in this way.

At the time it promulgated the rule, the Commission relied on a general provision in the Act allowing it to make rules "necessary and proper for administration and enforcement" of the Act.[9] It justified the rule by pointing out that it has the power to order domestic manufacturers to keep records on wool as it is made into goods; thus the Commission can check at an early stage to detect possible violations. For foreign goods, however, the Commission has no such power outside this country. Thus it must wait until the finished goods arrive here. To correct this imbalance it issued Rule 36.

In the absence of any supportive legislative history, we doubt that the Act's silence on the subject provides a valid authorization for Rule 36. The general "necessary and proper" clause is hardly a strong reed on which to rest this novel enforcement practice. While the Commission's concern about the imbalance favoring the foreign manufacturer of wool products is understandable, Rule 36 swings the balance sharply the other way. Pending Commission approval imported wool is sequestered, or subjected to stiff bond forfeiture possibilities, while domestic manufacturers are free to put mislabeled goods on the market. If a cease

[9] 15 U.S.C. § 68d.

and desist order is eventually issued, only that domestic wool not yet sold can be seized. Further, the domestic manufacturer has full notice and hearing rights not accorded to importers.

Consulting the legislative history, it seems fairly evident that Congress did *not* intend to give the Commission the power to control wool imports in this manner. In 1938 a bill similar to the one enacted a year later (the Wool Act of 1939) was passed by the Senate. The bill did not get to the House floor. That bill, S. 3502, contained a section on importers which was substantially similar to Rule 36.[10] In 1939 the Senate sponsors of S. 3502 reintroduced their bill, with some changes. One of the changes was the elimination of this section, and the substitution of what became the present importer section—the requirement only that importers furnish documents specifying labeling.[11]

The 1939 debates and reports were mainly concerned with the broad policy conflicts in enacting wool labeling requirements[12]; the importer provision received scant attention. What little comment there was, how-

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[10] The section would have allowed the Commission to detain goods at Customs while testing to see if any were mislabeled. The Commission was to make the initial decision. However, the wool importer was given the right to a hearing, but one at which the burden of proof was on him to show that the Act was not being violated. *See* S. Rep. No. 1685, 75th Cong., 3d Sess. (1938).

[11] This section (§ 8, 15 U.S.C. § 68f) is the only section in the Act relating specifically to importers. It requires them to furnish documents stating the wool content of the imported goods; it also provides that any importer found to have made false documents can be barred from any subsequent importing or can have any subsequent importing conditioned on furnishing a bond.

[12] *See* HEARINGS BEFORE SUBCOMMITTEE OF SENATE COMMITTEE ON INTERSTATE COMMERCE ON S. 162. 76th Cong., 1st Sess. (1939)

ever, shows that the Commission was denied the power given it in the 1938 bill—the power to detain wool at Customs for inspection and testing. Senator Schwartz, the floor manager of the bill, made a brief statement at the hearings on the new bill explaining why the importer section had been changed.

> "New provision is substituted with respect to imports. It avoids unjust burden that might be imposed on importer under S. 3502, and it follows principle and utilizes forms and procedure provided for in Tariff Act of 1930." [13]

Later, in the Senate debates, Senator Schwartz explained that the bill did provide for some check on importers, but that that check was to be placed in the hands of the Bureau of Customs in the Department of the Treasury:

> "* * * The bill provides that articles imported from abroad, when they come in, must be labeled according to the provisions of this bill; and that information must appear upon the manifests which are required under other sections of the general law, the tariff laws. *Under the bill those provisions will be enforced by the Treasury Department, and not by the Federal Trade Commission,* until after the products get into this country.
>
> * * * * *
>
> "* * * Under the provisions of the bill, there will have to be a labeling to show the contents of the goods, and the importer will have to stand behind the goods, and the investigations and administration of the law will be carried on by the Secretary of the Treasury and the customs officers. * * *" [14]

(Emphasis added.)

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[13] HEARINGS, *supra* Note 12, at p. 7.

[14] 84 CONG. REC. (Part 9) 9554 (1939).

The Senator produced a letter from the Secretary of the Treasury stating that the customs division would have to employ a certain number of extra persons to supervise this provision.[15] And consistent with the understanding that the Treasury Department, not the Commission, was to administer this section of the law, shortly after the Act passed the Secretary issued a rule, still in effect today, in which he provided that Customs officials could hold up wool imports while examining them for compliance with the Act:

> "Packages of fiber products subject to the provisions of this section which are not designated for examination may be released pending examination of the designated packages, but only if there shall have been filed in connection with the entry the usual customs single entry or term bond * * *."[16]

Thus whatever authority the Wool Act may have given the Bureau of Customs to issue a rule such as Rule 36, it seems clear that the statute did not authorize the Commission to promulgate a rule so foreign to its usual enforcement powers.

III

On appeal, for the first time, the Commission seeks to justify Rule 36 on a new ground. The Tariff Act of 1930[17] contains a section[18] which allows Customs to detain goods at the port of entry while Customs determines whether the goods comply with laws relating to them. The section applies to goods required by some law to be inspected, examiner or appraised. The Commission now argues that Rule 36 can be justified

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[15] *Id.* at p. 9496.

[16] 19 C.F.R. § 11.12b(c) (1968).

[17] 19 U.S.C. §§ 1302–1654 (1964).

[18] Section 499 of the Act, 19 U.S.C. § 1499.

on the authority of the Tariff Act; the reasoning goes that in both the Tariff Act and the Wool Act (citing the remarks of Senator Schwartz quoted in Part II, *supra*) the Bureau of Customs has authority to detain wool goods and test them to see if they are properly labeled. Rule 36, the argument continues, is merely in aid of this power; the Commission has simply "injected" itself into this standard Customs procedure.

For a number of reasons we decline to follow the Government down this road. First, the Commission in promulgating Rule 36 never stated that it was relying on this authority. Thus the parties never had a chance to make a record outlining the procedure used by Customs in normal cases, and never had a chance to develop an argument on the authority of Customs under the Wool Act.

Second, it is apparent that the Commission is not merely inserting itself into Customs procedure. Rule 36 is a Commission product from start to finish. It was promulgated by the Commission, to be supervised by the Commission, and all important determinations are to be made by the Commission. In this connection the Commission's argument runs afoul of the general principle that authority committed to one agency should not be exercised by another.[19] The reason for this is that Congress delegates to one agency certain authority, perhaps because it feels that agency is the most capable of exercising it. Thus Congress may well have felt that the Commission should restrict its enforcement powers to the type with which it was generally familiar—cease and desist procedures—and that Customs was better equipped to handle detention of goods at a port. Further, the political realities are often such that Congress has chosen a particular agency with a particular orientation toward a prob-

[19] *Cf.* § 9 of the Administrative Procedure Act, 5 U.S.C. § 558(a).

lem; the proper place for interested parties to get a different agency (with perhaps a more favorable orientation) to handle the job is back in Congress.

Third, we are totally uninformed concerning the views of Customs in this matter. Customs has not been a party to this litigation, just as it was not a party to the promulgation of Rule 36. We did note in Part II that Customs has a long-standing rule, promulgated pursuant to the Wool Act of 1939, generally similar to Rule 36. But the extent to which the Customs regulation has been enforced, and the need of Customs for help from the Commission, have not been shown.

Finally, we think that the authority for Customs to promulgate a rule such as Rule 36 is by no means free from doubt. Although the remarks of Senator Schwartz certainly indicate that Customs was intended to have some role in supervising wool imports, it is not at all clear that Customs was meant to enforce a rule as rigorous, and as *ex parte,* as Rule 36. We note that in some other acts Congress has provided explicitly for detention and testing of goods at the port of entry.[20] The Wool Act contains no such explicit authorization. And in those acts explicitly authorizing detention Congress has provided the importers with notice and a right to be heard before the agency detaining the goods.

Thus we think the Commission's post-promulgation rationalization is not sufficient to justify Rule 36. We leave open the question to what extent, with what cooperation from the Commission, and with what procedural safeguards the Bureau of Customs could legally promulgate a rule such as Rule 36.

Reversed and remanded.

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[20] Hazardous Substances Act, 15 U.S.C. § 1273 (1964); Food and Drug Act, 21 U.S.C. § 381 (1964).

APPENDIX

RULES AND REGULATIONS UNDER THE WOOL PRODUCTS LABELING ACT OF 1939

§ 300.36. Imported Wool Products.

(a) *Filing of notice of entry.* Any person who imports wool products into the United States that are subject to a requirement for formal entry through Customs shall file with the Bureau of Customs, at the time of entry for consumption or at the time of entry or withdrawal for consumption from warehouse, a form (Form 36A) in quadruplicate, in the manner prescribed by the Federal Trade Commission showing (1) the proposed type of entry of the shipment (consumption, warehouse, etc.), (2) the port of entry of the shipment, (3) the country of origin of the shipment, (4) a complete description of the products contained in the shipment and the cost thereof per unit in American dollars, (5) the information contained in the required fiber content labels affixed to wool products contained in the shipment, (6) the names and addresses of (i) the exporter, (ii) the manufacturer, (iii) the importer of record, and (iv) the actual importer of the wool products, and (7) the signature of the person filing such form. The original and two copies of Form 36A will be forwarded by the Bureau of Customs to the Bureau of Textiles and Furs, Federal Trade Commission, Washington, D.C. 20580, one copy being retained by the Bureau of Customs.

(b) *Temporary retention in customs.* Wool products subject to this section will be temporarily retained in Customs custody and not released to the importer until the Commission has issued a notice of release: *Provided, however,* That such wool products may be released from Customs custody prior to receipt of the

required notice of release upon the giving of a bond, such as an immediate delivery and consumption entry bond, in a form acceptable to the Commissioner of Customs conditioned upon the redelivery to Customs custody of the goods or any part thereof, upon demand by an officer of the Bureau of Customs based upon the determination of the Commissioner not to issue a notice of release.

(c) *Notice of release.* The Commission will issue a notice of release in one of the following ways: (1) A preentry notice of release may be obtained in appropriate cases where the requirements of paragraph (d) are met by the importer. (2) At ports of entry where a Commission inspector is on duty, he will, upon examination of the Form 36A, either issue a notice of release or inform the importer that certification or testing as provided in paragraph (e) of this section is required. Failure to make such determination within 3 working days after Form 36A is filed at such a port of entry shall be equivalent to the issuance of a notice of release. (3) At ports of entry where no Commission inspector is on duty, a determination whether to issue a notice of release or to require certification or testing will be made within 3 working days after the Commission receives the Form 36A. Failure of the Commission to make any determination within this period shall be equivalent to issuance of a notice of release. (4) If certification or testing is required, a notice of release will be issued by the Commission when and if the requirements of paragraph (e) of this section are satisfied.

(d) *Preentry notice of release.* The Commission will, at the request of an importer and upon a proper showing, issue a notice of release prior to entry into the United States of any shipment of wool products. Requests for preentry release shall be accompanied by such information or data, including manufactur-

ers' records, laboratory analyses, foreign government certifications, and certifications of government designated trade associations or other bodies, as will show no reason to believe that they may be misbranded. The Commission will also consider as relevant a statement that such products are of the same type, category, and fiber content and from the same manufacturer as products that were previously released by the Commission if such statement is accompanied by a copy of the original notice of release. Requests for preentry notice of release shall be filed as early as possible, but in no case less than 7 working days prior to the entry of any shipment. Prior to entry, the Commission will either (1) issue a notice of release, (2) inform the importer that it will require certification and testing of such shipment, or (3) inform the importer that the information submitted is insufficient to support a determination.

(e) *Certification or testing.* (1) Where the Commission has reason to believe that any wool products subject to this section may be misbranded, it may determine not to issue a notice of release but to require that such wool products be held for certification or testing. In such a case, at the option of the Commission, the Commission may (i) accept a certification as to the fiber content of such products based on a test method and sampling procedure approved by the Commission and submitted by a laboratory included in the Commission's list of approved testing laboratories, or (ii) require that it be furnished with samples of the wool products extracted by a person designated by the Commission, which the Commission will test or have tested at the expense of the importer. Upon acceptance of a proper certification or test results showing the products to be correctly labeled, the Commission will immediately issue a notice of release.

(2) If the certification or test results show the goods to be misbranded, the Commission will not issue a notice of release until after the goods have been correctly relabeled. If the certification or tests results demonstrate that there are such wide variations in the fiber content of individual wool products as to preclude a determination of fiber content on the basis of random sampling, the Commission will not issue a notice of release until after it has determined, upon consultation with the importer, the manner in which such goods should be relabeled, and such goods have been relabeled in conformity with that determination. Relabeling will be done at the expense of the importer, and the Commission will issue a notice of release immediately upon the receipt of satisfactory evidence from the importer showing that the goods have been correctly relabeled.

(f) *Forfeiture of bond.* Upon determination by the Commission that a notice of release will not be issued and where such wool products have been released to an importer under a bond described in paragraph (b) of this section, demand for their redelivery will be made. The failure of the importer to redeliver wool products to Customs custody, after demand therefor, shall subject such importer to payment of liquidated damages as provided for in the bond referred to in paragraph (b) of this section.

(g) *Examination and testing after release.* Any notice given by the Commission as to the manner of labeling imported wool products or any notice of release of wool products given under this section shall be without prejudice to the right of the Commission to subsequently examine and test additional wool products contained in any shipment of imported wool products which has been subject to the procedure provided by this section or to make inspections or

investigations relative to such products. The Commission will not proceed against any party for misbranding of wool products which have been subject to the testing procedures provided by this section without notice to such party and affording such party an opportunity to take such effective action as the Commission may deem appropriate to cause any misbranded products to be properly labeled: *Provided, however,* That such party must be able to establish that the wool products have been subject to the testing procedures provided by this section.

[32 F.R. 20853, Dec. 28, 1967, effective Feb. 12, 1968]

APPENDIX B

United States District Court for the District of Columbia

[Filed Nov. 4, 1968, Robert M. Stearns, Clerk]

Civil Action No. 306–68

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSOCIATION, ET AL., PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

Order

This matter having come before the Court on cross-motions for summary judgment and the intervenors' motion to dismiss and the Court having reviewed the memoranda of points and authorities and affidavits filed in support of the respective motions, and the Court having determined after hearing that there is no genuine issue as to any material fact it is by the Court, this 4th day of November, 1968,

ORDERED that the defendant's motion for summary judgment be, and the same hereby is, granted, and this action is hereby dismissed; and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, denied; and it is

FURTHER ORDERED that the defendant's motion for summary judgment having been granted, the intervenors' motion to dismiss be, and the same hereby is granted.

United States District Judge.

APPENDIX C

In the United States District Court for the District of Columbia

[Filed Feb. 27, 1968, Robert M. Stearns, Clerk]

Civil Action No. 306–68

TEXTILE AND APPAREL GROUP, AMERICAN IMPORTERS ASSN., ET AL, PLAINTIFFS

v.

FEDERAL TRADE COMMISSION, ET AL, DEFENDANTS

Order

This cause came on to be heard on Plaintiffs' Motion for Preliminary Injunction to restrain the Federal Trade Commission from enforcing Section 300.36 (a) through (g) of the Rules and Regulations of the Federal Trade Commission under the Wool Products Labeling Act of 1939 pending the final determination of this action; and the Court having considered the said motion and the complaint herein, and the affidavits and exhibits filed by plaintiffs in support of their motion and the affidavits and exhibits filed by defendants in opposition thereto; and having considered the memoranda of points and authorities submitted by the plaintiffs and the defendants; and having heard argument of counsel for the plaintiffs, counsel for the defendants, and counsel for the intervenors in open court, the Court makes the following

FINDINGS OF FACT

1. On or about December 22, 1967, the defendant Federal Trade Commission issued a regulation en-

titled Section 300.36 (a) through (g) of the Rules and Regulations of the Federal Trade Commission under the Wool Products Labeling Act of 1939, which by its terms, went into effect February 12, 1968.

2. The said regulation bars the shipment and distribution of wool products imported into the United States unless the Commission releases the said products or unless the importer files a bond conditioned upon the redelivery of the goods to Customs custody upon demand by an officer of the Bureau of Customs based upon the determination of the Commission not to release the said products.

3. No provision is expressly made in said regulation or the procedures described therein for a hearing on the issue of misbranding in the event that an importer chooses to furnish a bond pursuant to Paragraph (b) of said regulation or in the event of any alternative procedure available to him under said regulation.

Conclusions of Law

1. It appears to the Court, without prejudice to any contrary showing that the defendants may make at the trial of this case on the merits, that the said regulation, in failing to provide any proper procedure for notice, hearing and the entry of a reviewable order, deprives the plaintiffs of due process to which they are entitled under the Wool Products Labeling Act.

2. Plaintiffs are without any adequate remedy at law and will be irreparably injured unless enforcement of said regulation is enjoined pending the final determination of this action.

On the basis of the foregoing Findings and Conclusions, it is this 27th day of February, 1968,

ORDERED, That the Defendant Federal Trade Commission and all persons acting under its direction or authority or in active concert or participation with it, are hereby restrained and enjoined pending the final determination of this action from enforcing Section 300.36 (a) through (g) of the Rules and Regulations of the Federal Trade Commission under the Wool Products Labeling Act of 1939.

Judge.